IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2007

CORAM :

THE HON'BLE MRS. JUSTICE PRABHA SRIDEVAN

A.S.No.937 of 1988

Indira Devaraj Bhat .... Appellant/Plaintiff.

Vs.

1. S.Srinivas
2. R.Ranganayaki
3. Anandhi
4. S.Sridhar
5. P.R.Balakrishnan
   Prop. of M/s. Jayakrishna & Co.
6. P.T.Sambandan
7. S.Karpagam ..... Respondents/Defendants.

(RR6 & 7 impleaded as party respondent vide order of Court dated 12.01.2007 made in C.M.P.No.21238 / 04)

Appeal filed against the Judgment and Decree, dated 27.04.1988 made by the learned 19th Assistant Judge, City Civil Court, Madras in O.S.No.3012 of 1982.

For Appellant : Mrs.S.Ananda Bagavathi

For Respondents : Mr.T.V.Ramanujam, Senior Counsel for
Ms.M.Gunavalli for R5
Mr.D.Rajagopal for
Mr.S.M.Abdul Hameed for R2 and R3
Mr.Waran and Sairam for R4
Mr.R.Thiagarajan for R6 & R7

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J U D G M E N T

The wife of a mortgagee claims she has purchased the property in a sale out of Court, at the instance of the assignee of the interest from her husband. There is no proof of notice of sale and the bid was for a low price and no evidence of actual sale. Her suit was dismissed and she is the aggrieved appellant.

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2. The facts in the plaint are as follows:

The suit property belonged to the first respondent who had purchased it on 08-05-1958. He executed a simple mortgage on 07-05-1970 in favour of one Alagammai Achi for a sum of Rs.20,000/- with interest at 12%. The mortgage deed contained conditions with regard to right of sale under Section 69 of the Transfer of Property Act. Neither the principal nor the interest was paid. Therefore, the said Alagammai Achi brought the schedule property for sale through auctioneers on several occasions, but the sale was averted. On 27-08-1981, Alagammai Achi assigned the mortgage in favour of Dr.D.N. Bhat. The documents of title were handed over to Dr. D.N. Bhat. He in turn assigned his interest to one V.S. Sambandha Mudaliar under a deed dated 23-11-1981. This assignee issued a notice dated 12-01-1982 calling upon the first respondent to pay the entire principal and interest due. But neither the principal nor the interest was paid. Thereafter, Sambandha Mudaliar handedover the documents of title to the Government Auctioneers, the fifth respondent for sale under Section 69 of the T.P. Act. This was advertised in "Dinakaran" Newspaper dated 01-05-1982 and in "Dinamalar" Newspaper dated 30-04-1982 and pamphlets were also distributed to the general public. The auction was also scheduled to be held on 05-05-1982 at the premises of the suit property. There was sufficient publicity and there were several bidders. The plaintiff-appellant was declared as the highest bidder and her bid of Rs.46,500/- was accepted. The bid amount is paid to the fifth respondent who paid the amount due under the mortgage to Sambandha Mudaliar. The mortgage was discharged and cancelled. Thereafter, the fifth respondent sent a notice to the first respondent on 18-05-1982 calling upon him to receive the balance. There was no response to this. Thereafter, the said Sambandha Mudaliar, executed a sale deed on 30-07-1982 in favour of the appellant and the same was registered. She has therefore, become the absolute owner of the property and has taken symbolic possession. There was a tenant in this suit property who had been inducted by the first respondent. He vacated the property all of a sudden without informing the appellant. The respondents 1 to 4 in collusion have entered the suit property and are occupying the same illegally. The appellant sent a telegram on 26-10-1982 to receive the balance amount and to vacate the premises. She has also sent a notice through the counsel, the respondents failed and neglected to comply with the notice. Since they are in occupation illegally and wrongfully, the appellant is entitled to mesne profits. The suit was therefore, filed for declaration and recovery of possession and rendition of accounts. The plaintiff is the appellant. The second, third and fourth respondents are the wife, daughter and son of the first respondent. The respondents 6 and 7 have been impleaded by order dated 12-01-2007. There have been applications for withdrawal of appeal which withdrawal was denied and the appeal was restored, but it is not necessary to go into those aspects now.

3. The first respondent remained ex parte. It is alleged that he had become an ascetic. The second and fourth respondents filed a written statement which was adopted by the third respondent. In the written

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statement, it is stated that the fourth respondent filed O.S.No.8790 of 1975 for partition, which was dismissed for default. All the other averments were denied and the appellant was put to strict proof of the same. In particular, the respondents denied receipt of notice dated 12-01-1982, the publication of auction sale in the newspapers or the conduct of the sale. They denied knowledge of payment to Sambandha Mudaliar and the execution of the sale deed by Sambandha Mudaliar. According to them, the occupation of the property is in their own right.

4. The appellant examined herself as P.W.1. No other witness was examined on her behalf. On behalf of the respondents, the fourth respondent was examined as D.W.1. The appellant marked 18 documents. The respondents marked one document. The Trial Court came to the conclusion that the conduct of the sale was not bona fide and therefore, the sale under Section 69 of the Transfer of Property Act was not in accordance with law and also that no notice was given before the sale was conducted and dismissed the suit.

5. The learned counsel for the appellant submitted that Section 69 (2) (a) and (b) must be considered alternatively. If the mortgagee is in arrears of rent for the period mentioned in subsection (2) (b), then no notice need be given and relied on State of Mysore Vs. Dasappa Naidu (1968 (1) Mys.LJ 69). The learned counsel also submitted that the Trial Court had erred in finding that the sale is irregular because the bid of the appellant was far below the market value and relied on P.L. Chakrapani Naidu Vs. T. Gopal Mudaliar (1972 (II) MLJ 390), where a Division Bench of this Court held that merely because the property does not fetch a fair price, the sale should not be adjourned. In other words, the low price is not enough to infer collusion. According to the learned counsel, a sale was properly conducted and the appellant was the highest bidder, there is no illegality in the sale and the trial court had erroneously set aside the sale.

5. Mr.T.V.Ramanujam, learned Senior Counsel appearing for the Mortgagors submitted that the question whether notice is necessary and whether this is a case falling under Section 69 (2) (a) or 69 (2) (b) of the Transfer of Property Act, does not required to be answered, since the defence of the respondents / defendants that there was no sale at all on 05.05.1982 has been accepted by the learned Judge and there is no evidence to prove that there was sale on that date.

6. The learned counsel for the respondent 6 & 7 would submit that in this case mala fide is writ large and this Court should not interfere with the well considered judgment of the Trial Court. The learned counsel submitted that after having claimed that she had issued a notice for recovery of the principal under Section 69 (2) (a) of the T.P. Act, it is not now open to the appellant to contend that the sale was for recovery of interest under Section 69 (2) (b) and therefore, no notice need be sent. He also submitted that the assignee of the mortgage from Alagammai Achi,

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Dr.D.N.Bhat, has purchased the property himself, through his wife, the appellant. The intervening mortgagee-assignee viz., Sambandha Mudaliar is only a fictitious person. Since the appellant's husband could not purchase the property himself invoking the provisions of Section 69 of the T.P. Act, he created an assignment and thereafter, procured the mortgaged property in the name of his wife, the wife being the appellant. The learned counsel relied on various judgments to show that the mortgagee cannot be the purchaser.

7. The learned counsel Mr.D.Rajagopal, appearing for R2 and R3 submitted that, in addition to the other submissions made on behalf of the respondents, notice in accordance with Section 131 of the Transfer of Property Act was also not issued and in this case, there have been two assignments after the original mortgage in favour of Alagammai Achi, of which the mortgagors had no notice.

8. The questions to be answered in this appeal is

1. Whether the notice of the auction is imperative ?
2. Whether an auction sale actually was held on 05.05.1982 ?

9. The specific case of the defence is that there was no sale on 05.05.1982 at 4 p.m. The evidence of P.W.1 in this regard is that there were 8 or 9 persons present at the time of auction and that she is not aware of their names and she has also denied the suggestion that there was no auction. The documents with regard to the auction are Ex.A.8, the advertisement in Dinakaran, Ex.A.9, the advertisement in Dinamalar and Ex.A.10, sale proclamation of the auction proceedings. Apart from this, the appellant has not produced any other evidence to show that sale was in fact conducted on that day, by either examining the auctioneer or producing the auction register. As regards the assignment in favour of her husband, P.W.1 says "அந்த அடமானத்தை பட்டு என்பவர் பேரில் மேபோவர் செய்ததற்கான ஆவணம்...". The tenor of the evidence is to the effect that this assignee is a third person. Though there is no cross-examination, it is apparent without any investigation that this "பட்டு" is Dr.Bhat, her husband. P.W.1 says that it is not true to say that the defendant had no notice of the sale; and that it is not true that there was no sale. P.W.1 could have examined V.S.Sambandha Mudaliar, who exercised the power under Section 69 to prove the issuance of notice; she could have examined the 5th defendant to prove conduct of sale. But except for her own evidence, there is nothing else. D.W.1 has stated in his evidence that there was no sale and on the date of auction, the property was worth 4 or 5 lakhs. In the cross-examination, after re-examination, there is a suggestion that many people attended the sale. But, regards the value of the property, there is no cross examination. The value of the property for purpose of registration is Rs.1,31,000/-, the value as per D.W.1, which stands unrebutted is 4-5 lakhs, the value for which the property is purchased is Rs.46,500/-.

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10. As regards notice, under Section 69 (2) (a) and 69 (2) (b) of the Transfer of Property Act, in the plaint, the appellant had stated that notice was issued on 12.01.1982 by the assignee from the appellant's husband Dr.D.N.Bhat, calling upon the mortgagor to pay "entire Principal in interest due as on that date". The defendants 2 and 4 in their written statement have stated that they are not aware " that V.S.Sambandha Mudaliar issued a notice, dated 12.01.1982 to the first defendant, calling upon him to pay the entire principal and interest due under the mortgage."

11. Ex.A.6 is the legal notice issued on behalf of V.S.Sambandha Mudaliar, it is dated 12.01.1982. Ex.A.7 is the notice issued to the mortgagor by auctioneer, it is dated 20.02.1982. No proof has been filed to show that this notices have been received by the mortgagor. When the written statement categorically states that the respondents are not aware of this notice, the appellant ought to have proved by evidence, that the notice was indeed served on the mortgagor and either acknowledged by him or refuse to receive by him, as the case may be. The acknowledgment cards should have been produced. This burden of proving the service of notice has not been discharged by the appellant.

12. It is no doubt true that in State of Mysore vs. Dasappa Naidu (1968 (1) Mys. LJ 69), a Division Bench of the Mysore High Court has held that the clauses (a) and (b) of sub-sec (2) of S.69, are in the alternative and when the mortgagor owes arrears of interest of over Rs.500/-, no notice of sale is required to be served on the mortgagor. But, this is not the case of the appellant in her plaint. By her notice, she called upon the mortgagee to pay the entire Principal and interest and not just the arrears of interest. The property was brought to sale clearly for the default committed by the mortgagor in payment of principal and interest. This is clear, not only from Ex.A6 and Ex.A7, but also from the plaint. Even in the evidence, the appellant has not stated that the demand was for arrears of interest alone. Notices had been issued by on behalf of Sambanda Mudaliar, demanding principal and interest and it is to recover this amount that the property was brought to sale.

13. In Purasawalkam Hindu J S.Nidhi vs. Kuddus Sahib (AIR 1926 Madras 841), a Division Bench of this Court was called upon to consider whether the dismissal of the mortgagor's suit was justified on the ground that the power of sale was improperly exercised and that the notice was not properly given. Kumaraswami Sastri, J held that "Now, in this case, reading S.69 with the Articles of Association and the mortgage deed, I am clearly of opinion that before the sale is held for the purpose of recovering principal and interest due on the mortgage, notice has to be given and the learned Judge was right in coming to the conclusion that the want of notice was an irregularity because the fund did not act in a manner that would entitle them to have sold the property rightly. There was no notice given before the sale."

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14. In the present case, the mortgagor was called upon to pay both the Principal and interest and therefore, it is clear that the mortgagee was exercising his power under Section 69 (2) (a) of the Transfer of Property Act, which reads thus :

> No such power shall be exercised unless and until -
>
> (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or
>
> (b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

Therefore, the judgment of the Mysore High Court does not come to the aid of the appellant.

15. The learned counsel appearing for the respondents 6 & 7 submitted that the courts should notice the fact that the purchase at the court auction was by the wife of the assignee Dr.D.N.Bhat and that it was virtually a purchase by himself and this is frowned upon by the courts. The learned counsel also pointed out that the intervening assignment in favour of V.S.Sambandha Mudaliar is only a ruse to facilitate the purchase of the property by Dr.D.N.Bhat himself through his wife. Reliance was placed on Egmore Benefit Society vs. Aburupammal (1943 (1) MLJ 92), where it was held that under Section 69 of Transfer of Property Act " the mortgagee cannot purchase the property at the private sale, the principle being that a man cannot contract with himself and this principle is not abrogated merely because there is a contract between the mortgagor and the mortgagee that the latter could purchase the mortgaged property at the auction. The learned counsel for the appellant had referred to the recitals in the original mortgage deed in favour of Alagamai Achi, where the parties had agreed that the mortgagee, had the liberty to by any such sale. But, in view of this decision, it is evident that to allow such a contract will to negate the provision based on public policy.

16. In Vallabhdas vs. Pranshankar (AIR 1929 Bombay 24), it was held that when a mortgagee puts up the mortgaged property for sale under a power given him by his mortgage deed, he cannot sell it to himself, either alone or with others, nor a trustee for himself.

17. In Ashwin S.Mehta vs. Custodian ((2006) 2 SCC 385), the Hon'ble Supreme Court held in para 70 to show that it is only a bonafide purchaser, who is protected in such auction sale. According to the respondents, the appellant, which is none other than the wife of the previous assignee is not protected.

18. The learned counsel for the appellant referred to Trustees, Port of Madras vs. Good Year India (AIR 1973 Madras 316) and Ram Singh vs. Khirodhan Devi (AIR 1983 Patna 151), to show that new pleas cannot be

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entertained at the appellate stage, when there are no pleadings in the written statement. To this, the learned Senior Counsel and the other learned counsel appearing on behalf of the respondent would submit when the irregularity glares at the Court, no further evidence is required and the facts speaks for themselves, it is open to the parties to point out such vitiating factors to support their case.

19. A.Batcha Sahib vs. Nariman K.Irani (AIR 1995 Madras 491) is the Judgment of the Division Bench, which hold that even bonafide and substantial defence open to the mortgagor regarding correctness of the amount or the prematurity of the sale are not available under Section 69, which is a drastic provision and places bonafide mortgagors in a very helpless possession. That judgment may help the appellant, if she had proved that there was a sale on 05.05.1982. Since, that has not been proved, this Judgment does not help.

20. Ranganayakamma vs. K.S.Prakash (AIR 2005 Karnataka 426) was relied to show that mere use of words like fraud and collusion are not sufficient, necessary particulars should be placed before the court. To the same effect, Nasir-ud-din vs. Ahmad Husain (AIR 1926 Privy Council 109), K.Kanakarathnam vs. A.Perumal (AIR 1994 Madras 247), Kansi Ram vs. Jai Ram (AIR 1956 HM Pra.4) was placed. This is not a case of fraud and collusion. The categoric case of the appellant was that there was no sale on that date and the conduct of sale was not proved by acceptable evidence. So, these decisions are not relevant.

21. The learned counsel for the respondent 6 & 7 referred to Jerup Teja & Co., vs. Peerbhoy (AIR 1921 Bombay 421), to show that default in payment of interest for three months would not amount to default of payment of mortgage money. This judgment is clearly relevant in this case for the mortgagors have not paid any amount, but the appellant would still not derive any benefit from the same, since the appellant had issued notice, calling upon member to pay the principal and interest, as per Section 69 (2) (a) of the Transfer of Property Act. But the notice in writing , which she is bound to issue to the mortgagors has not been proved to have been sent to the mortgagors or received by them.

22. In Ramakrishna Mudali vs. Official Assignee, Madras (AIR 1922 Madras 390 (2)), the Division Bench, considered the question whether the sale can be attacked on the ground that notice was not given or the power of sale was improperly or irregularly exercised and the Division Bench held that if there is improper or irregular exercise of power, the mortgagor shall have his remedy only in damages. This again does not help the appellant, as she has not proved that the sale had taken place. To the same effect, is Kundu vs. Rookonand (AIR 1918 Lower Burma 64).

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23. R.S.Nadar vs. Indian Bank Ltd., Madras (AIR 1967 SC 1296) was relied on, where the learned Judge has held as follows :

> "3...The language of this sub-section is clear and unambiguous. The section lays down in no uncertain terms that the requisite notice may be given to the mortgagor or one of several mortgagors where there is a number of them, the obvious idea being that the mortgagor who is given the notice is constituted the agent of a mortgagor to get no notice under this Section, if he comes to learn that the property has been sold without any notice to him. .."

24. Satyapal vs. Rukayyabai, (AIR 1993 Bombay 203) was relied on by the learned counsel appearing for the respondents 2 and 3, where the learned Judge held that sale without intervention of Court must be conducted bonafide and where the sale proclamation falsely describes property; neither reserve price nor estimated price were mentioned, exact property tax arrears were not mentioned instead language used giving erroneous impression that property was seriously encumbered, rental income property yielded was not given and property sold at less than 25% of its true value and on facts, it was held that mortgagee and purchaser were acting in tandem and committed fraud in conducting sale. Auction sale was declared void and not binding on plaintiff mortgagor. In the present case too, the trial court came to the conclusion that the property was sold at a very low value, market value was higher. The appellant was aware of the same, since she had purchased stamp papers for a value of Rs.1,30,000/-, though the property was assessed at Rs.1,46,000/- and her evidence with regard to the manner, in which auction sale was conducted is extremely unsatisfactory. Even the notice given by the auctioneers, Ex.A.12 does not help her case. Perhaps if the appellant had taken the trouble to examine the auctioneers to show how many persons bid at the auction and what were the bids, then this Court might have had some material in favour of appellant.

25. Babamiya vs. Jehangir (AIR 1941 Bombay 339), was referred, to show that the notice under Section 69 (2) (a) is not only necessary, but it is imperative and the advertisement of sale of mortgage property in the newspaper is not a sufficient intimation to the mortgator.

26. Chakrapani Naidu vs. Gopal Mudaliar (1972 (2) MLJ 390) was strongly relied on by the learned counsel for the appellant, to show that neither insufficiency of the principal of the bidders, nor insufficiency of price could vitiate the sale. That case was some what the similar to the present case. Suits were filed to prevent the auction, previous auctions were obstructed and the Division Bench had observed that the mortgagee was not actually of any fraudulent conduct and that if bidder offers were not forthcoming, it was because of the obstructive tactics, pursued by the mortgagors and in that conduct, the Division Bench refer to the English Decision to show when the mortgagee is not a trustee of the

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board of the sale for the mortgagor, but in the same decision, the Division Bench held that the auctioneers records, day books and ledgers were all filed and the Division Bench carefully perused the same and arrived at the conclusion that there was an auction and there was evidence that at the time of auction, there were 40 or 50 persons present and that nothing was done in secrecy. No such evidence is available in the present case.

27. It is true that fraud and collusion cannot be proved, merely on the ground that the mortgagee had managed to purchase the property in the name of his wife, there must be convincing acceptable evidence. In this case, the pleadings on either side are far from satisfactory. But however from the dates of the various documents marked in evidence, it is seen that the husband of the appellant had obtained the assignment of the mortgagor on 23.11.1981 and within less than two months thereafter, the mortgage was assigned to another person and within four months, the appellant purchased the property, at the so called auction sale. Even on the date of auction, the property was worth Rs.1,30,000/-. There is no evidence available to show whether the auctioneers fixed a reserve price, there is no evidence to show how many bidders were there and there is nothing to show that there was a genuine auction sale on 05.05.1982.

28. The appellant cannot succeed, on the ground that no notice is necessary, if interest alone is due, for she came to court, stating that notice had been issued, claiming the principal and interest, which is as per Section 69 (2) (a) of the Transfer of Property Act, for which notice is imperative. Even the paper publications effected do not inspire any confidence to show that the auctioneers had any intention to give a wide publicity. There is no evidence that there were many bidders, except the self serving evidence of P.W.1. Nor is there evidence to show that the sale was indeed conducted bonafide. This Section is a very harsh section, and if it requires a notice in writing, then the least, that is required of the mortgagor or the purchaser is to prove that the notice was given, especially when the mortgagors have denied receipt. The materials on record hardly inspire any equitable consideration in favour of the appellant. " While dealing with the mode of exercise of power, the mortgagee must exercise the power in a prudent way... He has his own interest to consider, as well as that of the mortgagor and so long as he keeps within the term of the power, exercises the power in good faith for the purpose of realising the security and takes reasonable precautions to secure a proper price, the court will not interfere... This duty to obtain a proper price is owed also to subsequent mortgagees but not to a surety " Halsbury's Laws of England IV Edition MORTGAGE P.726
The following glaring infirmities attend the alleged auction sale

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a) Notice is imperative, since the appellant's case is that sale was under S.69 (2) (a), but there is no evidence of service of notice.

b) No satisfactory evidence of sale.

c) The particulars given in sale proclamation are inadequate.

d) Purchase, though only by a prior mortgagee's wife. The close proximity of dates of transaction renders the purchase vulnerable to doubt.

e) The purchase price is pitifully low.

f) There is no proof that the mortgagee, who brought the property to sale was discharged.

Therefore, there is no warrant for any interference in the appeal and the appeal is dismissed with costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

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To

1. The 19th Assistant Judge, City Civil Court
Madras.

2. The Registrar,
City Civil Court,
Madras.

3. The Section Officer, VR Section,
High Court, Madras.

+ 2 CCs To Mr. R.Thiagarajan, Advocate SR NO.32915
+ 2 CCs To Mrs.Ananda Bagavathi, Advocate SR NO.33055
+ 1 CC To M/s.Waron and Sairam, Advocate SR NO.32353

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